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IN THE

Supreme Court of the United States

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION,
owner or owner *pro hac vice* of Barges 1011,
1384, 1400, 1363, and others in a fleet,
Petitioner,

vs.

HOWARD E. PFEIFER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

I. Did the Lower Courts err in ruling that the plaintiff had a valid cause of action against his employer under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act?

II. Did the Lower Courts err in applying the law of the Commonwealth of Pennsylvania, specifically the case of *Kaczkowski vs. Bolubasz*, to a case filed under a federal statute, determining the proper measure of damages?

III. Did the Lower Courts err in not applying, as a set-off to plaintiff's damages, the wages introduced by the defendant for light duty work, without first determining who has the obligation to offer work or mitigate damages?

TABLE OF CONTENTS.

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Petition	6
I. The courts of appeals are sharply divided and Congress' intent unclear concerning §905(b) third-party negligence actions against employer-vessel owners under the 1972 amendments	6
II. The Lower Courts applied Pennsylvania's law of damages and the different treatment among the circuits regarding inflation demonstrates the need for resolution by this Court	11
A. The Lower Courts applied Pennsylvania's law of damages	11
B. Different treatment among the circuits regarding inflation demonstrates the need for resolution by this Court	12
III. The Lower Courts have imposed on the employer the additional burden of offering to a (totally) disabled claimant whose disability is totally unrelated to his claim, light duty work and have abrogated the plaintiff's duty to mitigate his damages by seeking work which he is capable of performing	15

page

A. There is no basis in fact or reason for requiring an employer to offer work to an employee, totally disabled for non-work related reasons, in order to receive credit for a set-off 16

B. An employee's failure to pursue in good faith employment which he is capable of performing should not impose upon the employer the burden of providing work to receive a set-off 17

Conclusion 18

Appendix A, Opinion of the Third Circuit Court of Appeals 1a-16a

(1) Judgment on Petition for Rehearing 17a

(2) Amendment *Sur* Petition for Rehearing . 18a-22a

(3) Certified Judgment in lieu of formal Mandate 23a

(4) Order Recalling the Mandate 24a

Appendix B, Opinion of the District Court for Western District of Pennsylvania 27a-44a

TABLE OF AUTHORITIES.

Cases:

Alexander vs. Meiji Kaiun K.K., 195 F. Supp. 831, aff'd, 311 F.2d 385 18

Arvidson vs. Dillingham Corp., 462 F.2d 1 7

Bach vs. Penn Central Transportation Co., 502 F.2d 1112 12,14

Baker vs. Baltimore & Ohio R. Co., 502 F.2d 638 18

Baker vs. Pacific Far East Lines, Inc., 451 F.Supp. 84 7,9,10

page

Byrd vs. Reederie, 638 F.2d 1300, rehearing granted, 650 F.2d 1324 13
Complaint of Allied Towing Corp., 416 F.Supp. 1207 6
Cooper Stevedoring Co. vs. Fritz Kopke, Inc., 417 U.S. 106 9
Doca vs. Marina Mucante Nicaraguenge, S.A., 634 F.2d 30 12,13
Feldman vs. Allegheny Airlines, Inc., 382 F.Supp. 1291, Aff'd, 524 F.2d 384 14
Griffith vs. Wheeling-Pittsburgh Steel Corp., 521 F.2d 31, cert. denied, 423 U.S. 1054 5,6,7,8
Houston vs. Bechtel Associates Professional Corp., 522 F.Supp. 1094 7
Kaczkowski vs. Bolubasz, 491 Pa. 561, 421 A.2d 1027 5,11,12,14
Lottawanna, The, 88 U.S. (21 Wall.) 558 11
Magill vs. Westinghouse Electric Corp., 464 F.2d 294 13
McGinley vs. United States, 324 F.Supp. 62 18
Murphy vs. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, 545 F.2d 235 7
Napoli vs. Hellenic Lines, Ltd., 536 F.2d 505 6
Norfolk Western Railway vs. Liepelt, 444 U.S. 490 .. 13
Northeast Marine Terminal Co. vs. Caputo, 432 U.S. 249 10
O'Rourke vs. Long, 41 N.Y.2d 219, 391 N.Y.S.2d 553, 359 N.E.2d 1347 7
O'Shea vs. Riverway Towing Co., No. 81-1924, Slip Op. (7th Cir. April 27, 1982) 12
Perini Corporation vs. Heyde, 306 F.Supp. 1321 15,17

page

Pope & Talbot, Inc. vs. Hawn, 346 U.S. 406..... 11
Powell vs. Hellenic Lines, Ltd., 347 F.Supp. 855 15,17
Reed vs. The Yaka, 373 U.S. 410 5,6,7,8
Riha vs. Jasper Blackburn Corp., 516 F.2d 840 12,14
Smith vs. M/V Captain Fred, 546 F.2d 119..... 6
Steckler vs. United States, 549 F.2d 1375..... 13
St. Hilaire Moue vs. Henderson, 496 F.2d 973, cert. denied, 419 U.S. 884 12
United States vs. English, 521 F.2d 63..... 12,13,14
Williams vs. United States, 435 F.2d 804..... 13

Statutes:

28 U.S.C. §1254(1) 2
33 U.S.C.A. §904..... 4,5
33 U.S.C.A. §905 2,3,5,6,7,8
33 U.S.C.A. §933..... 3,8

Legislative Materials:

3 U.S. Code Cong. & Admin. New, pp. 4704-05 9

Rules of Court:

Federal Rules of Civil Procedure
Rule 52(a)..... 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Jones & Laughlin Steel Corporation, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on April 16, 1982.

Opinions Below

The opinion of the Court of Appeals (App A, *infra*, 1a-16a) has not yet been reported. The opinion of the District Court (App. B, *infra*, 27a-44a) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals (App. A, *infra*, 17a) was entered on April 16, 1982. A *sur* petition for rehearing *en banc* was denied on May 20, 1982, with Judge Adams joined by Judge Hunter dissenting (App. A, *infra*, 21a). The certified judgment in lieu of formal mandate was issued on May 28, 1982 (App. A, *infra*, 23a). Appellant's motion for stay of mandate filed on June 2, 1982 was treated as a motion to recall the mandate. The motion was granted and the mandate recalled by Judge Aldisert on June 8, 1982 (App. A, *infra*, 25a).

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Statutory Provisions Involved

1. 33 U.S.C.A. §905

> (a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such

action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such persons was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

2. 33 U.S.C.A. §933

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an

employee where he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

Statement of the Case

Howard E. Pfeifer, respondent, instituted this third party negligence action in the District Court alleging jurisdiction on the basis of Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).

Respondent was employed by Jones & Laughlin (J&L) as a landing helper, working on J&L's coal barges. On January 13, 1978, respondent suffered injuries when he fell on the gunnel of the barge while carrying a motor and breaker box for use in pumping out barges.

Respondent never returned to work after the incident and, at the time of trial, was on a disability pension from J&L for physical impairments which had nothing to do with the incident of January 13, 1978. Pfeifer made a claim for and received payments within the terms of the LHWCA. He then filed the instant negligence action against J&L as the employer vessel owner *pro hac vice* of the barge.

The District Court determined that petitioner, as a vessel owner *pro hac vice*, was liable for negligence under §905(b) of the LHWCA, rejecting petitioner's argument that §905(a) precludes an employer's third-party liability where the employer has secured payment of compensation in compliance with §904 of the LHWCA, 33

U.S.C.A. §904. The District Court also held that the recent Pennsylvania Supreme Court case of *Kaczkowski vs. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), dictated that the damages for lost future earnings not be discounted to present value. Finally, the District Court held that damages for future earnings should be factored on the basis of the minimum wage rate instead of wages for light duty work. In reaching this conclusion, the Court rejected petitioner's argument that there is no logical reason why J&L should have been required to offer a light duty position to respondent when the facts adduced at trial showed that respondent was totally disabled and the disability was unrelated to the incident of January 13, 1978.

The Third Circuit Court of Appeals affirmed all three questions on appeal. The appeals court rejected petitioner's §905(b) LHWCA argument on the basis of the holdings in *Griffith vs. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976), and *Reed vs. The Yaka*, 373 U.S. 410 (1963). Likewise, the appeals court rejected petitioner's argument that lost future wages be discounted to present value. And although the Court stated that the holding in the Lower Court was limited to the proper federal measure of damages, it stated later in the opinion that it could find no jurisprudential impediment to the adoption of Pennsylvania's measure of damages. Finally, the Court concluded that the District Court's set-off based on the minimum wage rate was not "clearly erroneous" under the standard of Fed.R.Civ.P. 52(a).

The Court of Appeals denied petitioner's *sur* petition for rehearing on May 20, 1982, and a certified judgment in lieu of mandate was issued on May 28, 1982. Peti-

tioner's motion for stay of mandate was treated as a motion to recall the mandate. Judge Aldisert granted the motion and recalled the mandate in order to allow petitioner the opportunity to petition this Court for writ of certiorari.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully submits that all three issues passed upon by the Courts below present important questions of federal law which have not been, but should be, settled by this Court. Accordingly, the reasons and arguments for the allowance of the writ are treated separately for each issue below.

I. The courts of appeals are sharply divided and Congress' intent unclear concerning §905(b) third-party negligence actions against employer-vessel owners under the 1972 amendments.

Four circuits have ruled or indicated in dicta that §905(b) affords an injured employee a cause of action in negligence against the vessel owner, even though the owner is also the employer. *Napoli vs. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Griffith vs. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed. 2d 643 (1976); *Smith vs. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977); *Complaint of Allied Towing Corp.*, 416 F.Supp. 1207 (E.D. Va. 1976). These courts have sidestepped the literal interpretation of §905(a) in favor of this Court's decision in *Reed vs. The Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1963).

Three circuits and the New York Supreme Court have ruled or indicated in dicta that §905(a) imposes an absolute limitation and forecloses a §905(b) suit in negligence against the owner-employer. *Murphy vs. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976) (dictum); *Arvidson vs. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972); *Houston vs. Bechtel Associates Professional Corp.*, 522 F. Supp. 1094 (D.C.D.C. 1981); *O'Rourke vs. Long*, 41 N.Y.2d 219, 391 N.Y.S.2d 553, 359 N.E.2d 1347 (1976). These courts have taken the approach that §905(a) means exactly what it says, namely, that an employer's liability for compensation shall be exclusive of all other liability.

The two cases which best point up the dichotomous results and reasoning are *Griffith, supra*, and *Baker vs. Pacific Far East Lines, Inc.*, 451 F.Supp. 84 (N.D. Calif. 1978). Most importantly, these cases, the question involved, and the frequency at which the question is likely to arise, present the strongest reasons for review by this Court.

The Third Circuit Court of Appeals in *Griffith* relied on this Court's pre-amendment holding in *Reed, supra*, and on legislative history to reach the conclusion that §905(b) permits a negligence action against an owner-employer. The Court first discussed the language of §905(A) which reads in part:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . ."

There is no exception in §905(a) for §905(b) liability of an "employer" who is also a "vessel," other than, of course, the exception where the employer fails to secure payment

required by the Act. *Griffith I,* 521 F.2d at 42. The Court recognized further that a literal interpretation would be consistent with the language in §933(a), which reads in part:

> "If ... the person entitled to such compensation determines that some person *other than the employer* ... is liable in damage, he need not elect whether to receive such compensation or to recover damages against such third person." (emphasis supplied.)

Finally, the Court conceded that there is "no argument in logic and reason" why longshoremen should be treated any differently under the LHWCA than their land based counterparts under workmen's compensation laws. The Court stated: "The heart of all workmen's compensation systems is the trade-off between the certainty of benefits and the limitation of employer liability." *Griffith I,* 521 F.2d at 42.

However, the Court felt compelled to permit plaintiff's cause of action because of this Court's decision in *Reed* and certain language found in House Reports made in contemplation of the 1972 LHWCA amendments. As this Court well knows, *Reed* construed §905(a) (then §905) as permitting a §905(b) suit based on unseaworthiness against a *pro hac vice* owner who was also an employer. The *Griffith* court reasoned that "since Congress made no change in the operative language of the exclusive remedy provision, [it] would appear to be bound by the eviscerating construction of *Reed vs. The Yaka* ..." *Griffith I,* at 43. The Congressional language relied upon by the Court provide in part:

> "The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services . . ." 3 U.S. Code Cong. & Admin. News, p. 4705 (1972).

And,

> ". . . Nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition . . ." 3 U.S. Code Cong. & Admin. News, p. 4704 (1972).

As indicated earlier, the Ninth Circuit, among others, has taken the exact opposite approach in *Baker vs. Pacific Far East Lines, Inc., supra.* In concluding that §905(a) provides absolute exclusivity, the Court relied on this Court's holding in *Cooper Stevedoring Co. vs. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174, 40 L.Ed.2d 694 (1974), language from the above quoted House Report, and an analogy to state workmen's compensation schemes.

The Court read *Cooper* as limiting the employee's right to recovery to that of unseaworthiness, quoting this Court:

> "[E]ven if Erie were negligent, its injured employee was entitled to claim compensation from it under the Harbor Workers' Act, and Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provision." 417 U.S. at 115, 94 S.Ct. at 2179, 40 L.Ed.2d 694.

It further reasoned that since the Sieracki-Ryan-Yaka decisions only applied in the unseaworthiness context, and since the 1972 amendments eliminated unseaworthiness, the "slate was wiped clean." "Given that Congress worked so hard to preclude the possibility of indirect recovery, it would be anomalous if Congress had simultaneously allowed direct employed versus employer lawsuits." *Baker*, at 94.

The *Baker* court quickly disposed of plaintiff's argument based on the language of the House Report. Noting that the same argument prevailed in the Fifth Circuit, the Court found that the same language can be interpretted to require precisely the opposite result: since negligence actions are not permitted against stevedore-employers, such actions should not lie against vessel-employers either. *Ibid.* at 95.

Finally, the Court held that since negligence actions against employers are not permitted under state compensation statutes, and since Congress' intent has always been to guarantee injured longshoremen treatment similar to that received by land-based workers covered by workmen's compensation, it should follow that LHWCA employers are also immune from negligence suits. The Court cited this Court's decision in *Northeast Marine Terminal Co. vs. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), in support of its rationale.

Thus, these cases represent the two completely different approaches taken and results reached on this very important issue. Because this involves very substantial rights and liabilities, petitioner strongly urges this Court to resolve the matter at this time.

II. The Lower Courts applied Pennsylvania's law of damages and the different treatment among the circuits regarding inflation demonstrates the need for resolution by this Court.

A. The Lower Courts applied Pennsylvania's law of damages.

In 1980, the Pennsylvania Supreme Court announced that inflation must be considered in awarding damages for lost future earnings. *Kaczkowski vs. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). The Court adopted, what is commonly called, the total offset method, whereby the award is not discounted to present value presumably because the inflation rate is equivalent to the discount rate.

It is petitioner's position that the District Court applied Pennsylvania damage law and this was improper since jurisdiction in a LHWCA case is based, of course, on a federal question. And while the Court of Appeals dismissed this point, petitioner refers this Court to Judge Cohill's opinion (App. B, *infra*, 27a) and submits that the conclusion is inescapable that the learned Judge felt bound by *Kaczkowski*. The Petitioner raised this point prior to the start of testimony and filed a Proposed Finding of Fact relating to reduction of any award to present worth. The ruling by the Lower Court is contrary to this Court's holdings in *Pope & Talbot, Inc. vs. Hawn*, 346 U.S. 406, 74 S.Ct. 202, _____ L.Ed. _____ (1953), and *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875). The cases reinforce the mandate of Article III, §2 of the Constitution by requiring a uniform federal standard in "all Cases of admiralty and maritime Jurisdiction."

Petitioner recognizes that admiralty courts may apply state law by express or implied reference when the federal law is incomplete, *St. Hilaire Moue vs. Henderson*, 496 F.2d 973 (8th Cir. 1974), cert. denied, 419 U.S. 884, 95 S.Ct. 151, 42 L.Ed.2d 125 (1974), but submits that this simply is not the case here. Notwithstanding the approach taken by a majority of the circuits sitting in federal question jurisdiction cases, the Third Circuit requires that damages for future impairment or future lost earnings be reduced to present worth. There was no need for the Lower Courts to resort to Pennsylvania's law of damages and the need for upholding the integrity and uniformity of federally created causes of action dictate that this approach be examined and the issue resolved.

B. Different treatment among the circuits regarding inflation demonstrates the need for resolution by this Court.

Assuming *arguendo* that the Lower Courts merely borrowed the underlying theory of *Kaczkowski*, rather than applying the state law *per se*, the proliferation of confusing appellate decisions and the different treatment that the issue of future inflation has received among the circuits demonstrate the need for this Court to rule upon the issue. A survey of the different approaches reinforces the need for a definitive standard.

Presently, six circuits permit future inflation to be taken into account in damage calculations. *Doca vs. Marina Mucante Nicaraguenge, S.A.*, 634 F.2d 30 (2d Cir. 1980); *Bach vs. Penn Central Transportation Co.*, 502 F.2d 1112 (6th Cir. 1974); *O'Shea vs. Riverway Towing Co.*, No. 81-1924, Slip Op. (7th Cir. April 27, 1982); *Riha vs. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975); *United States v. English*, 521 F.2d 63 (9th Cir.

1975); *Steckler vs. United States*, 549 F.2d 1375 (10th Cir. 1977). Three circuits have declined to do so. *Williams vs. United States*, 435 F.2d 804 (1st Cir. 1970); *Magill vs. Westinghouse Electric Corp.*, 464 F.2d 294 (3d Cir. 1972) (until the instant case); *Byrd vs. Reederie*, 638 F.2d 1300, rehearing granted, 650 F.2d 1324 (5th Cir. 1981). And, the Fourth and D.C. Circuits have yet to make an appellate pronouncement on the issue. Generally, the rationale advance by the majority is that discounting, which values a lump sum award to reflect the present purchasing power of the dollar, leaves the plaintiff less fully compensated, given the realities of modern economics. Those Courts rejecting inflation adjustments have done so on the grounds that estimates of future inflation are too speculative to serve as a basis for calculating damages.

While it can be argued that this Court's holding in *Norfolk Western Railway vs. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), at least portends the mood of the Court regarding inflation adjustments in future damage awards, the Second Circuit, in *Doca*, did not suggest that *Liepelt* compelled the result reached there, permitting inflation adjustments. The Fifth Circuit, in *Byrd*, expressly stated that *Liepelt* is not controlling and that it would adhere to its discounting rule until this Court speaks more directly or until that Court *en banc* overturns the rule. Petitioner respectfully submits that "the practical wisdom of the trial bars and the trial bench" will not soon resolve the issue without a definitive statement from this Court on the propriety of inflation adjustments.

There remains the unresolved question of the proper method by which inflation should be considered. The Courts that have permitted inflation adjustment have taken one of four approaches. The first approach submits the question to the factfinder after expert opinion evidence on the rate of future inflation has been introduced. *United States vs. English, supra* at 75-76. The second approach forbids expert testimony and permits the fact-finder to apply his own knowledge and prediction in estimating a future inflation rate. *Bach, supra* at 1122-23. The third method is a blend of the first and second, and allows both common sense and expert opinion evidence. *Riha, supra* at 845. The fourth method removes the issue from the fact-finder and adopts a rule of law that infers a constant relationship between the interest rate and inflation rate. *Kaczkowski, supra* 491 Pa. at 581, 421 A.2d at 1037. There, the Pennsylvania Supreme Court adopted the total offset method. A slightly different approach was adopted in *Feldman vs. Allegheny Airlines, Inc.*, 382 F.Supp. 1291 (D. Conn. 1974), aff'd, 524 F.2d 384 (2d Cir. 1975), where the Court used an inflation adjusted discount of 1.5% after determining that the interest rate averaged 1.5% less than the inflation rate.

The confusion and controversy among circuits is understandable given the variety of approaches outlined above and the general uncertainty surrounding economic forecasting. Petitioner believes that the law is at a stalemate and will develop no further without clarification by this Court.

III. The Lower Courts have imposed on the employer the additional burden of offering to a (totally) disabled claimant whose disability is totally unrelated to his claim, light duty work and have abrogated the plaintiff's duty to mitigate his damages by seeking work which he is capable of performing.

The law is clear that the burden is on the employer to establish that an employee who proves he is disabled from his regular employment has actual opportunities to obtain other work. *Perini Corporation vs. Heyde*, 306 F.Supp. 1321 (R.D.I. 1969). It is equally established, however, that the plaintiff has the duty to minimize his damages by doing work that he can perform. *Powell vs. Hellenic Lines, Ltd.*, 347 F.Supp. 855 (E.D.La. 1972). It follows that the Trial Court's findings concerning the extent and nature of plaintiff's disability are crucial in determining the burdens imposed on the respective parties. Where a finding of total disability is made, the duties imposed by *Perini* and *Powell* are inapposite, and in petitioner's case, it would have no duty to prove that the plaintiff is capable of performing other work. However, in cases of partial disability, the respective duties are imposed. It is petitioner's contention that the findings of fact and law in the District Court fail to provide an adequate basis for determining the duties of the parties. For this reason petitioner presents the issues below in the alternative.

The District Court made inconsistent findings of fact and the Appellate Court failed to face that issue. In Findings numbers 34 and 36 the Court found the plaintiff to be totally disabled, but specifically for reasons not involving the accident complained of. In Findings 41 and 42 the Court then found that plaintiff could perform

sedentary work. Finding 48 was that no light duty job was offered plaintiff by the defendant and incorrectly found in Finding 54 that plaintiff applied for two jobs and was physically unable to pass the physical examinations.

In the Conclusions of Law, the Court completely ignored any conclusion as to the legal obligation of the parties regarding the availability and/or offer of work. By ignoring the Finding of Fact that plaintiff was totally disabled, the finding that the set-off was based upon minimum wage and not light-duty work, the Court effectively ruled that the defendant must offer work to someone who is permanently and totally disabled. It should have been enough to show that the work was available, which was done, rather than require the fiction of an offer to one who could not accept a job.

A. There is no basis in fact or reason for requiring an employer to offer work to an employee, totally disabled from non-work related reasons, in order to receive credit for a set-off.

If the District Court calculated its measure of damages on the basis that respondent was totally disabled, petitioner submits that the employer's showing that light work was available should entitle petitioner to a set-off based on light work wages. It is a meaningless formality to require the employer to offer a position to the employee which the employee is incapable of performing. The District Court seemed to place much emphasis on the fact that petitioner never offered the respondent a light work position, and, apparently on that basis, concluded that the set-off must be calculated using the minimum wage rate. The District Court by so holding, and the Court of Appeals by affirming, tacitly implicated

the *Perini* doctrine. That doctrine limits, by its terms and the facts of that case, the employer's duty of showing that other work is available to situations *where the plaintiff is capable of performing light work.* Petitioner submits that the respondent cannot be said to be totally disabled and, at the same time, capable of performing light work.

B. An employee's failure to pursue in good faith employment which he is capable of performing should not impose upon the employer the burden of providing work to receive a set-off.

If the District Court calculated its damages on the basis that the respondent was capable of performing light duty work, there is an obvious conflict between the employer's duty to show that work is available, *Perini*, and the employee's duty to mitigate his damages, *Powell.* These cases do little to define these duties and it is on this issue that petitioner requests this Court's clarification.

As mentioned earlier, the District Court relied heavily upon the fact that petitioner never offered the respondent a light duty position. Petitioner, at trial, believed that *Perini* required only that it show that light work was *available.* But, even *Perini* contemplates that the plaintiff will seek to mitigate his damages by attempting to perform other work or, at the very least, applying for jobs at which he can work without being affected by his disability. Respondent testified at trial that he casually *inquired* of other work but that he submitted no applications. The District Court stated in its findings of facts that the respondent has *applied* for two jobs and had been refused for failing to pass the physical examinations. Certainly, the Court's finding weighed heavily in its decision.

Respondent's failure to mitigate his damages leaves the petitioner to choose between employing respondent in a different capacity and claiming the set-off based on that wage or not employing the respondent and bearing the entire burden of a set-off based on the minimum wage. This result is anomolous when one considers the results reached in *Baker vs. Baltimore & Ohio R. Co.*, 502 F.2d 638 (6th Cir. 1974); *McGinley vs. United States*, 324 F. Supp. 62 (E.D. Pa. 1971); and *Alexander vs. Meiji Kaiun K.K.*, 195 F.Supp. 831 (E.D. La. 1961), aff'd, 311 F.2d 385 (5th Cir. 1962). Petitioner submits that the amount of an employer's set-off should not be determined as a matter of the employee's choice and respectfully requests this Court to clarify the duties of the employer and employee in situations such as the one presented in the instant case.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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